

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PHILLIP L. DICK,

Plaintiff,

v.

STEPHEN COCKLIN.,

Defendants.

Case No. C07-5370FDB/JKA

ORDER TO SHOW CAUSE

This civil rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Plaintiff was given leave to proceed *in forma pauperis*. Defendants in this case filed an answer and allege plaintiff was convicted of third degree assault on a police officer (Dkt # 11). Defendant admits he is the police officer who was assaulted and this is the incident in question where force was used to subdue plaintiff (Dkt # 11).

Plaintiff admits he was convicted of third degree assault on a police officer in a reply to defendant's answer which he titles "Affirmative defenses to defendants answer's." (Dkt # 13). Plaintiff cannot collaterally challenge his conviction by attempting to re-litigate the facts used to convict him in a criminal proceeding in this civil rights action. When a person confined by the state is challenging the very fact or duration of his physical imprisonment, and the relief he seeks will determine that he is or was entitled to

1 immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas  
 2 corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). In June 1994, the United States Supreme Court held  
 3 that "[e]ven a prisoner who has fully exhausted available state remedies **has no cause of action under § 1983**  
 4 **unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the**  
 5 **grant of a writ of habeas corpus.**" Heck v. Humphrey, 512 U.S. 477, 487 (1994)(emphasis added). The  
 6 court added:

7 Under our analysis the statute of limitations poses no difficulty while the state challenges are  
 8 being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for  
 9 damages attributable to an unconstitutional conviction or sentence does not accrue until the  
 conviction or sentence has been invalidated.

10 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be made based  
 11 upon whether 'the nature of the challenge to the procedures [is] such as necessarily to imply the invalidity of  
 12 the judgment.' *Id.* If the court concludes that the challenge would necessarily imply the invalidity of the  
 13 judgment or continuing confinement, then the challenge must be brought as a petition for a writ of habeas  
 14 corpus, not under § 1983." Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting Edwards v.*  
 15 Balisok, 520 U.S. 641 (1997)).

16 Plaintiff is now **ORDERED TO SHOW CAUSE:**

- 17 1. Is this action a challenge to the force used to arrest you which led to your conviction for third  
 18 degree assault?
- 19 2. If so, why should this case not be dismissed under the case law outlined above?

20 A response to this order to show cause is due on or before **February 15, 2008**. Failure to respond or  
 21 an inadequate response may result in a Report and Recommendation that this action be dismissed.

22 The Clerk is directed to a copy of this order and counsel for defendant and note the **February 15,**  
 23 **2008**, due date on the court's calendar.

24  
 25 DATED this 14 day of January, 2008.

26  
 27 /S/ J. Kelley Arnold  
 28 J. Kelley Arnold  
 United States Magistrate Judge